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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYBefore the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)

Implementation of Section 10 of)
the Cable Consumer Protection and)
Competition Act of 1992)

MM Docket No. 92-258

Indecent Programming and Other Types)
of Materials on Cable Access Channels)PETITION FOR RECONSIDERATION
OF THE NYNEX TELEPHONE COMPANIES

New York Telephone Company and New England Telephone and Telegraph Company (the "NYNEX Telephone Companies" or "NTCs") respectfully ask the Commission to reconsider certain aspects of its First Report And Order released February 3, 1992.¹ In particular, the NTCs are concerned that, by giving cable operators "wide discretion" in banning programming they deem indecent, and by allowing cable operators to ban some but not all indecent programming, the Commission has invited cable operators to unreasonably deny access to leased channel capacity, and to discriminate among potential customers based on factors other than the indecency of their programming. In addition, by giving aggrieved customers access only to the

¹ In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, Indecent Programming and Other Types of Materials on Cable Access Channels, MM Docket No. 92-258, First Report and Order, February 3, 1993.

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courts for remedy if access to leased channels is unreasonably denied, the Commission abdicates its role under the Cable Act to provide expedited procedures for ensuring reasonable terms and conditions for leased access channels.

I. DISCUSSION

The 1992 Cable Act permits cable operators:

to enforce a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.²

In its First Report and Order, the Commission stated that this provision gives cable operators "wide discretion" in classifying programming as indecent, and in enforcing a policy of prohibiting indecent programming.³ The Commission stated that cable operators may adopt "any measures" appropriate for implementation of such a policy, and that cable operators "have the discretion to prohibit some, but not necessarily all, indecent programming."⁴ The Commission concluded that "the courts, rather than this agency, are the appropriate forums for resolution of any disputes concerning whether cable operators have properly denied access pursuant to section 10(a)."⁵

2 1992 Cable Act § 10.

3 First Report and Order ¶ 29.

4 Id. ¶ 31.

5 Id.

These actions conflict with the Commission's obligations under other sections of the 1992 Cable Act. In particular, Section 9 of the Cable Act requires the Commission to make rules establishing reasonable terms and conditions for commercial use of leased channel capacity, and to establish procedures for the expedited resolution of disputes.⁶ Section 11 requires the Commission to ensure that no cable operator can unfairly impede the flow of video programming from the video programmer to the consumer.⁷ In Comments on the implementation of Section 9, the NYNEX Telephone Companies urged the Commission to require cable operators to offer channel capacity to unaffiliated entities on nondiscriminatory prices, terms and conditions, and to require that a cable operator may not refuse a reasonable request for channel capacity.⁸

By giving cable operators "wide discretion" in determining what they believe is indecent and in enforcing their policies, unchecked by any Commission supervision, and by explicitly allowing cable operators to discriminate among providers of "indecent" programming, the Commission positively invites cable operators to unreasonably deny access to their channel capacity. Thus, cable operators have a means to block programming from reaching subscribers based on factors

6 1992 Cable Act § 9(b).

7 1992 Cable Act § 11(c).

8 Comments of the NYNEX Telephone Companies, MM Docket No. 92-266, January 27, 1993, pp. 18-19.

unrelated to indecent programming. For example, the Commission's language allowing discrimination would appear to allow cable operators to ban indecent programming provided by a competitor, while accepting the same programming provided by an affiliated programmer or another noncompeting entity. And, by giving customers unreasonably denied access under the guise of "indecent" recourse only to the courts, the Commission is perpetuating the problems of difficulty and delay in obtaining access to leased channel capacity that Congress sought to prevent in enacting Section 9.⁹

The Commission should remedy these aspects of the First Report and Order by ruling that the cable operator may not discriminate among providers of like programming. Further, the Commission should emphasize the Cable Act's requirement that the cable operator may not prohibit programming unless the cable operator "reasonably" believes it is indecent because it contains the elements listed in Section 10. Finally, the Commission should allow customers unreasonably denied access to leased channels redress under the expedited procedures established under Section 9, rather than requiring them to go to court.

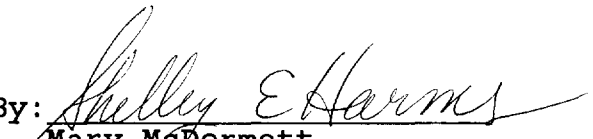
⁹ See House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong. 2d Sess. (1992) ("House Report") pp. 39-40.

II. CONCLUSION

For the reasons stated herein, the NYNEX Telephone Companies respectfully ask the Commission to reconsider the First Report and Order, and to conform it with sections of the Cable Act mandating reasonable and nondiscriminatory access to leased channels, and expedited procedures for resolving disputes.

Respectfully submitted,
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Dated: March 15, 1993

CERTIFICATE OF SERVICE

I certify that copies of the foregoing PETITION FOR RECONSIDERATION OF THE NYNEX TELEPHONE COMPANIES were served on each of the persons listed on the attached Service List for MM Docket No. 92-258, this 15th day of March, 1993, by first class United States mail, postage prepaid.



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